

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

**APPEAL NO. 382 OF 2005
IN
NOTICE OF MOTION NO. 1568 OF 2004
IN
SUIT NO. 1455 OF 2004**

1. Mahendra Jayantilal Vora	]	
2. Hemang Mahendra Vora	]	
3. Chirag Mahendra Vora	]	
all of Mumbai Indian inhabitants,	]	
having their Office at 101, Balaji	]	
Arcade, 1st floor, S.V. Road,	]	.. Appellants
Kandivli (West), Mumbai 400 067.	]	(Ori. Pltffs.)

Versus

1. Aditya Enterprises, a partnership	]	
firm, having its Office at 602,	]	
Soni Shopping Centre, L.T. Road,	]	
Borivli (West), Mumbai - 400062.	]	
2. Abhay S. Chandak.	]	
3. Aditya S. Chandak,	]	
both Defendant Nos.2 and 3 of Mumbai	]	
Indian inhabitants, the partners of	]	
Aditya Enterprises, having their	]	
Office at 602, Soni Shopping Centre,	]	
L.T. Road, Borivli (West),	]	.. Respondents
Mumbai - 400 062.	]	(Ori.Defendants)

Mr. S.H. Doctor with N.C. Parekh i/b M/s. Mansukhlal & Hiralal for the appellants.

Mr. D.D. Madan, senior counsel with Mr. Cyrus Ardeshir i/b M/s. Kanga & Co. for the respondents.

**CORAM: R.M. LODHA &
ANOOP V. MOHTA, JJ.**

DATED: 03RD FEBRUARY, 2006

ORAL JUDGMENT. : [Per R.M. Lodha, J.]

. The appellants are original plaintiffs in the suit filed by them for declaration that the agreement dated 26th August, 2002 has been legally and validly terminated by the plaintiffs with effect from 10th March, 2004 and that the defendants have no right, title or interest under the said agreement and/or in respect of construction already put up by the defendants and direction to defendants by way of mandatory injunction to remove themselves and their materials and machineries etc. from the said construction site forthwith. The plaintiffs took out Notice of Motion praying for the following interim reliefs:

(a) that pending the hearing and final disposal of the suit, the Defendants, their servants and agents be directed by a mandatory order an injunction to forthwith remove themselves their materials and machineries, etc. from the said construction site.

(b) Pending the hearing and final disposal of the suit, Court Receiver, High Court Bombay be appointed as Receiver under Order XI, Rule 1 of CPC with all powers with directions to appoint the Plaintiffs as his agents without any security or royalty in order to develop and construct on the construction site as the Plaintiffs deem fit.

(c) that pending the hearing and final

disposal of the suit, the Defendants, their servants and agents be restrained by an Order and injunction of this Hon'ble Court from entering and remaining upon the said construction site and putting up any construction thereof and interfering with and obstructing the completion of construction work and development by the Plaintiffs.

(d) that pending the hearing and final disposal of the suit, the Defendants, their agents and servants be restrained by an order and injunction of this Hon'ble Court from selling, encumbering, alienating or creating any third party rights in any manner whatsoever in respect of any portion of the said Project."

2. The defendants contested the Notice of Motion by filing reply Affidavit and *inter alia* set up the case that the defendants have sold nine flats to various purchasers and by the letters dated 2nd March, 2004, 19th March, 2004 and 31st May, 2004, the plaintiffs were informed in that regard. According to the defendants, the plaintiffs were aware that the said nine flat purchasers have an interest and any order passed by the Court would affect the right, title and interest of the nine flat purchasers. We are informed that subsequently, agreement of one flat purchaser has come to an end.

3. In the backdrop of this aspect, it appears the learned Motion Judge directed the plaintiffs to amend the Plaint by joining the persons whose names were

disclosed in the letter dated 31st May, 2004 of the defendants at Sr.Nos.1 to 5, 7, 8 and 9 and carry out necessary consequential amendments in the Plaint. The learned Motion Judge recorded the statement made on behalf of the defendants that they would not create further third party interest until the disposal of the suit and that they would not carry out any further construction without seeking the leave of the court. In view of these statements, the learned Motion Judge disposed of the Notice of Motion with liberty to take out fresh Notice of Motion seeking interim reliefs including the interim reliefs which were sought in the Notice of Motion.

4. We deem it proper to reproduce the order dated 1st April, 2005 as it is:

" CORAM: D.K. DESHMUKH, J.
DATED: 1st April, 2005

P.C.

1. Heard the learned counsel for both the sides. The learned counsel for defendants states that the defendants have already furnished the details which they were required to furnish according to clause 2(i) of the order dated 28th May, 2004. The learned counsel further states that the defendants will not create any further third party interest till the disposal of the suit. The learned counsel for defendants further states that the defendants also will not carry out any further construction without

seeking the leave of the Court. The statements are accepted.

2. In view of these statements, the notice of motion is disposed of with liberty to the plaintiffs to take out fresh notice of motion, seeking interim reliefs including the interim reliefs which are sought in this notice of motion.

3. The Plaintiffs are also granted leave to amend the plaint by joining the persons whose names are disclosed in the letter dated 31st May, 2004 of the defendants, at Sr. Nos.1 to 5, 7, 8 and 9, and also to carry out necessary consequential amendments in the plaint."

5. The aforesaid order is impugned in the present Appeal.

6. In a recent decision given by us on 23rd January, 2006 in **Appeal No.1068 of 2005 in Madhukar Venkatesh Ullal Vs. M/s. Anita Hermy D'Souza & ors.**, we considered the question whether an Appeal is maintainable under clause 15 of the Letters Patent from an order for impleadment of the party in the suit. We considered the judgment of the Supreme Court in the case of **Shah Babulal Khimji Vs. Jayaben D. Kania & Anr. AIR 1981 SC 1786** and few other judgments and applying the tests as set out in **Shah Babulal Khimji**, we held that an order of addition of parties by the learned Trial Judge does not amount to judgment for the purposes

of clause 15 of the Letters Patent and an Appeal against such order was not maintainable. We held thus:

"22. In so far as an order of addition of parties is concerned, surely, it is not a final judgment. It is so because such order does not decide the question or issues in controversy in the suit; it does not bring an end to suit or action. Such order is not preliminary judgment as well. By ordering addition of the party, the suit is not disposed of on a preliminary point. The debatable issue is whether the order of addition of party is interlocutory or intermediary judgment as categorised by the Supreme Court and hence appealable under clause 15 of the Letters Patent. Our answer is in the negative. For one, such order does not possess the characteristics and trappings of finality in as much as it decides nothing and is only initiatory. The other it does not adversely affect a valuable right of the party directly nor decides an important aspect of the trial in an ancillary proceeding. Such order is only procedural in nature. Ultimately nature and effect of the order would be determinative in holding whether such order is 'judgment' within the meaning of clause 15 of the Letters Patent. Where the trial Judge allows an impleadment of the party being either necessary or property party, what is ordered is the participation of the party in the suit who has not been impleaded by the plaintiff initially. By impleadment of that party neither important aspect of the trial nor ancillary proceedings is decided. Such order even directly does not affect the valuable right of the plaintiff. Merely because the plaintiff has to fight the case against a party unwillingly or that it may to some extent widen the controversy in the suit, that would not mean that his valuable right is directly affected. We find ourselves in agreement with the well considered opinion of the Madras High Court that by addition of a party rights of the parties in any manner are not decided nor the proceedings are

determined finally. Where the trial Judge allows any impleadment of the party in a given case at best some right of the plaintiff would be affected but the damage or prejudice caused to him is not direct or immediate but of a minimal nature and rather too remote because the plaintiff has full right to contest the defence that would be set up by the added party and succeed in the suit. By such order, there is no determination of any right or liability nor does it take away substantial right of the plaintiff and, therefore, an order of addition of a party shall not fall within the meaning of the word 'judgment' under Clause 15 of the Letters Patent.

23. The question of impleadment of the party has to be decided on the touch stone of the Order 1 Rule 10 of the Code of Civil Procedure which provides that only a necessary or proper party may be added. Rule 10(2) confers a discretion upon the court to meet every case of defective parties. The necessary party is one without whom no order can be made effectively. In the absence of necessary party, the suit must fail. On the other hand, a proper party is a party in whose absence an effective order can be made but whose presence enables the court to decide the question involved in the proceedings finally and effectually. As observed by the Supreme Court in *Shah Babulal Khimji*, the trial Judge of the High Court with vast experience of various branches of law occupying the very high status should be trusted to pass discretionary or interlocutory orders with due regard to the well settled principles of civil justice. Any discretion exercised by the trial Judge in the course of the suit which may cause some inconvenience or, to some extent, prejudice one party or the other cannot be treated as a judgment. When an application for impleadment of the party in the suit is made before the trial Judge of the High Court, obviously, such application is considered by the trial Judge on the touch stone of Order 1 Rule 10 as to whether such party is a necessary or proper party in a suit. The trial Judge exercises his judicial

discretion having regard to the facts and circumstances of the case. In our considered view, the order passed by the trial Judge of the High Court directing addition of party, even if it be assumed that it may cause some inconvenience or prejudice to the plaintiff cannot be held to be 'judgment' for the purposes of clause 15 of the Letters Patent. Such order is neither intermediary nor interlocutory judgment as cataloged by the Supreme Court in the case of Shah Babulal Khimji. The order of addition of a party cannot be said to be causing substantial injustice nor is such order a matter of moment deciding directly valuable rights of the parties.

24. We, thus, hold that the order passed by the learned trial Judge for addition of respondent No.20 as party defendant is not a 'judgment' under clause 15 of the Letters Patent and, therefore, not appealable. Appeal is dismissed accordingly."

7. In view of our decision in the case of Madhukar Venkatesh Ullal, the present Appeal cannot be held to be maintainable insofar as it seeks to challenge the order of the Motion Judge directing addition of the parties.

8. Mr. S.H. Doctor, the learned senior counsel for the appellants submitted that even if the Appeal is not held to be maintainable against the order of addition of the parties, there is legitimate grievance raised in the Appeal about disposal of Notice of Motion by the learned Motion Judge without considering the same on merits and to that extent, the Appeal is maintainable

and the impugned order is liable to be interfered with. It appears to us that the learned Motion Judge disposed of the Notice of Motion without going into its merits as in his opinion the flat purchasers were needed to be impleaded as party defendants and it was only after they were impleaded that the prayer for interim relief/s as prayed for in the Notice of Motion could be considered. It was in this view of the matter that the learned Motion Judge granted liberty to the plaintiffs to take out fresh Notice of Motion seeking interim reliefs including the interim reliefs which were sought in the Notice of Motion. If the learned Motion Judge was right in directing that the flat purchasers were needed to be impleaded as parties then the order of the learned Motion Judge in disposing of the Notice of Motion without going into the merits cannot be faulted, particularly when liberty was granted to the plaintiffs to take out fresh Notice of Motion for interim reliefs. Since the Appeal against the order of addition of parties is not maintainable, we cannot go into the question of correctness of the said order. Since the order of addition of parties stands, the disposal of the Notice of Motion in the manner done by the learned Motion Judge in paragraph 2 of the impugned order cannot be faulted.

9. For the reasons that we have indicated above, the Appeal is liable to be dismissed and is dismissed with no order as to costs.

Sd/-
[R.M. LODHA, J.]

[srpasha@hc]

Sd/-
[ANOO V. MOHTA, J.]